

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
)	
Implementation of Section 716 and 717 of)	CG Docket No. 10-213
the Communications Act of 1934, as Enacted)	
by the Twenty-First Century)	
Communications and Video Accessibility)	
Act of 2010)	
)	
Amendments to the Commission's Rules)	WT Docket No. 96-198
Implementing Sections 255 and 251(a)(2) of)	
the Communications Act of 1934, as Enacted)	
by the Telecommunications Act of 1996)	
)	
In the Matter of Accessible Mobile Phone)	CG Docket No. 10-145
Options for People who are Blind, Deaf-)	
Blind, or Have Low Vision)	

**Opposition to Petition for Waiver by the National Cable &
Telecommunications Association**

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The Rehabilitation Engineering Research Center on Telecommunications Access (RERC-TA)¹, Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, and the Deaf and Hard of Hearing Consumer Advocacy Network (collectively, the “Consumer Groups”), respectfully submit this Opposition in response to the Commission’s Public Notice in the above-captioned matter.² Consumer Groups oppose the National Cable & Telecommunications Association (“NCTA”) petition for waiver from the advanced communications services (“ACS”) requirements for the following class of equipment: set-top boxes leased by cable operators to their customers and manufactured before July 1, 2016.³ Consumer Groups urge the Commission to deny the waiver request unless the waiver period is narrowly limited, the equipment included in a particular class is specifically defined, and a condition is provided to allow the public to file complaints about any improper application of the waiver.

I. THE REQUESTED WAIVER WOULD BE INCONSISTENT WITH THE FUNDAMENTAL PURPOSE OF THE CVAA

The fundamental purpose of the Twenty-First Century Communications and Video

¹ The contents of these comments were developed with funding from the National Institute on Disability and Rehabilitation Research, U.S. Department of Education, grants number H133E090001 and H133E080022 (RERC on Universal Interface and IT Access and RERC on Telecommunications Access). However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.

² *Request for Comment Petition for Class Waiver of Commission’s Rules for Access to Advanced Communications Services and Equipment by People with Disabilities*, CG Docket No. 10-213, DA 12-984 (rel. June 21, 2012).

³ National Cable & Telecommunications Association Petition for Waiver, CG Docket No. 10-213 (filed June 1, 2012) (“*NCTA Petition*”).

Accessibility Act of 2010” (“CVAA”)⁴ is “to ensure that the 54 million Americans with disabilities are able to fully utilize [ACS].”⁵ Already, set-top boxes are available on the market that come with pre-installed support for applications that use ACS functionality, such as email and social networking⁶ or allow the installation of applications that utilize ACS. Cable operators, too, are making forays into this arena, as evident by the marketing of Facebook integration in Comcast set-top boxes.⁷ Cable operators routinely bundle telecommunication packages as part of their offerings and it is expected that telecommunication including voice and video will be part of set top box operations. These ACS features and functionalities must be made fully accessible to users who are deaf or hard of hearing, particularly as the Connected TV concept gains traction, and smart set-top boxes gain market presence, to meet the fundamental goal of the CVAA. The Commission should therefore deny the NCTA Petition and rigorously enforce the CVAA standards so that users with disabilities are able to attain and maintain

⁴ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.).

⁵ *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, ¶ 1 (2011) (“Order”).

⁶ Google Android 4.0 iCS Smart TV set top box 1080P HD Video Player, available at: http://www.aliexpress.com/store/product/Google-Android-4-0-iCS-Smart-TV-set-top-box-1080P-HD-Video-Player/803232_494687309.html ; see also: Netgear to release broadband-connected TV set-top (September 2011), available at: <http://www.michaelsinsight.com/2011/09/netgear-to-release-broadband-connected-tv-set-top.html>

⁷ Comcast Unveils New Xfinity TV Set-Top Boxes With Integrated Facebook And Intel Processors (June 14, 2011), available at: <http://www.slashgear.com/comcast-unveils-new-xfinity-tv-set-top-boxes-with-integrated-facebook-and-intel-processors-14159375/>

access that is functionally equivalent to that accorded other users of set-top boxes, now and in years to come.

The concept of Connected TVs is slated to gain significant market share in the next few years⁸, and it stands to reason that set-top boxes will continue follow this trend expressed in the above-cited offerings by Comcast, Netgear, and Google, *especially as far as cable operators are concerned*, lest they should lose out to the competition in Internet-provided video content. In fact, set-top boxes provide the primary interface between the consumer and the cable operators' offerings, and thus any features that provide cable operators with a competitive advantage, including ACS features, are likely to manifest there. Moreover, the trend is for TV, Internet, and telecommunications to converge, as is evident by the increasing bundling of services (including Comcast Xfinity and Verizon FiOS), and it is a natural step for set-top boxes to consolidate these functions. Steps must be taken now to achieve the CVAA goals and ensure users with disabilities are able to fully access ACS features and functions on cable operator-provided set-top boxes, particularly as the competition between traditional cable TV operators and Internet video distributors continues to heat up, and ACS features are used to distinguish offerings from the competition.

As described below, the Commission should deny the NCTA Petition because NCTA has failed to show that a waiver is warranted pursuant to the Commission's primary purpose test, given that the ACS features of set-top boxes provide a co-primary purpose and set-top boxes are designed and marketed as multipurpose devices. Also,

⁸ "Why Connected TV Is Poised to Revolutionize Entertainment," Ronald Jacoby (citing Parks Associates) (May 11, 2011) *available at* <http://mashable.com/2011/05/11/future-connected-tv/> .

NCTA has not justified the proposed waiver period. For these reasons, Consumer Groups urge the Commission to deny the request unless the waiver period is narrowly limited, the waiver class is specifically defined, and a condition is provided to allow the public to file complaints about any improper application of the waiver.

II. THE REQUIRED WAIVER IS IMPROPER UNDER THE “PRIMARY PURPOSE” TEST

When considering whether to grant a waiver request pursuant to Section 716(h)(1), the Commission has made clear that it will “focus [its] waiver inquiry on whether a multipurpose equipment or service has a feature or function that is capable of accessing ACS but is nonetheless designed primarily for purposes other than using ACS.”⁹ It has adopted two factors to evaluate the primary purpose of equipment or service: (1) whether equipment or service was designed to be used for ACS purposes by the general public, including whether there are multiple, co-primary purposes, and (2) whether equipment or services is marketed for the ACS features and functions.¹⁰ In addition, other factors may be considered by the Commission, such as examining the “impact of the removal of the ACS feature or function on a primary purpose for which the equipment or service is claimed to be designed.”¹¹

NCTA argues that historically set-top boxes have been used for the single purpose of converting video signals for viewing on TV.¹² They, however, concede that “[...]advances hold significant promise for enabling cable operators to leverage existing

⁹ *Order* at ¶ 181.

¹⁰ *Id.* at ¶¶ 182-185; 47 C.F.R. § 14.5(a)(2).

¹¹ *Id.* at ¶ 186.

¹² *NCTA Petition* at p. 5.

infrastructure to deliver innovative new capabilities [...]”¹³, but maintain that this would not alter the primary purpose of the set-top box devices, because it would remain primarily designed “for the reception and delivery of cable services.”¹⁴ This argument discounts the possibility that cable services themselves are likely to undergo a significant transformation, in order to stay competitive with Internet-based providers. Rather than remaining a passive medium, cable services are already used for telecommunications and accessing the Internet, and it is specious to assume that video programming services will exist in a vacuum apart from these other two functions, when the convergence of these constitutes one of the greatest competitive strengths of the cable providers.

The argument also fails to consider that “the CVAA would have little meaning” if ACS requirements could be waived for multipurpose equipment and services without an *exclusive* primary use such as the example of smartphones which is cited by the Commission.¹⁵ Indeed, as set-top boxes are designed to incorporate more features and functions, including ACS, they resemble smartphones more and more – in fact, some set-top boxes run on the Android operating system, which was designed for smartphones.¹⁶

Moreover, one of the tests for primary purpose is the marketing test – and in this area, ACS features are already clearly being marketed to the prospective buyers of set-top boxes. For instance, one of the stated advantages of smart set-top boxes by BestBuy is the

¹³ *NCTA Petition* at p. 7.

¹⁴ *NCTA Petition* at p. 7, fn. 16.

¹⁵ *Order* at ¶ 184.

¹⁶ Google Android 4.0 iCS Smart TV set top box 1080P HD Video Player, available at: http://www.aliexpress.com/store/product/Google-Android-4-0-iCS-Smart-TV-set-top-box-1080P-HD-Video-Player/803232_494687309.html

ability to access social media¹⁷, which themselves encompass ACS functionality. Likewise, the Facebook integration into Comcast Xfinity set-top boxes cited prominently in the article¹⁸, as well as the intent of Comcast to partner with Skype point in the direction of providing more and more ACS functionality as part of the TV experience¹⁹, and that it will be marketed as such. The Commission should therefore determine that set-top boxes, including the ones leased by cable operators, are multi-purpose devices with multiple primary and co-primary purposes and are designed and marketed as multi-purpose devices.

III. THE SCOPE OF THE WAIVER REQUEST IS UNREASONABLE

The Commission has authority to grant class waivers when “classes are carefully defined” and when the petitioner has “defined with specificity the class of common equipment or services.”²⁰ Such authority is discretionary and does not extend to the exemption of services or equipment.²¹ Petitioners must also explain in detail the expected lifecycle of equipment or services included in a class waiver request.²²

¹⁷ Smart Set-Top Boxes: What kind of content can I get? – Accessing Facebook and Twitter. Available at: <http://www.bestbuy.com/site/Electronics-Promotions/Smart+Set-top+Boxes/pcmcat275100050012.c?id=pcmcat275100050012>

¹⁸ Comcast Unveils New Xfinity TV Set-Top Boxes With Integrated Facebook And Intel Processors (June 14, 2011), available at: <http://www.slashgear.com/comcast-unveils-new-xfinity-tv-set-top-boxes-with-integrated-facebook-and-intel-processors-14159375/>

¹⁹ Comcast Partners With Skype To Bring HD Video Calling To Your TV (June 14, 2011). Available at: <http://www.slashgear.com/comcast-partners-with-skype-to-bring-hd-video-calling-to-your-tv-13159104/>

²⁰ *Order*. at ¶ 193.

²¹ *Id.* at fn. 537.

²² *Id.* at ¶ 194.

NCTA requests that the waiver cover set-top boxes leased by cable operators to their customers and manufactured before July 1, 2016.²³ NCTA contends that this would cover only a single generation of products, due to the six-year lifecycle of cable operator-leased set-top boxes.²⁴ Although the goal of excluding as few products from the ACS obligations as possible is laudable, it is doubtful that in practice a four-year waiver would extend to only a single generation of products in the set-top box market. The video programming landscape has been changing significantly, with the entry of Internet-based contestants such as Apple TV, Google TV, Roku, Boxee, Amazon, Netflix, Hulu, and others. More and more, consumers see themselves faced with the question whether they should keep cable services in the first place, when so many “over-the-top” video offerings are available.²⁵ And some pundits predict that in the face of increased competition from Internet-based on-demand services, TV revenues are poised to fall off a cliff.²⁶

Whether these predictions will come true remains to be seen. But cable TV providers are undeniably facing pressure due to the competition from streaming video on the Internet, and it is unreasonable to assume that the above-cited six-year product lifecycle will be sustainable for cable operators in the near future even before 2016. There is a strong possibility that changing marketplace conditions will force cable

²³ *NCTA Petition* at p. 1.

²⁴ *Id.* at pp. 4-5.

²⁵ 1 Million Pay TV Users Cut Cord in 2011 (April 4, 2012). Available at: <http://www.dsreports.com/shownews/1-Million-Pay-TV-Users-Cut-Cord-in-2011-119098>

²⁶ Don't Mean To Be Alarmist, But The TV Business May Be Starting To Collapse (June 3, 2012). Available at: <http://www.businessinsider.com/tv-business-collapse-2012-6?op=1>

providers to exploit their existing infrastructure for new and innovative applications much sooner than 2016, including the role of the set-top box, much like the advent of the iPhone disrupted the smartphone market and led to completely new applications in a span of only a few years.²⁷

It is also important to remember that set-top-boxes are now capable of being reprogrammed remotely meaning that boxes in the field can be upgraded to successive generations and new capabilities. That is, one hardware generation can be taken through multiple product generations and new feature sets via remote software upgrade.

The scope of NCTA's waiver request is unreasonable. Asking for a four-year waiver assumes that there will be no disruptive events in the marketplace that force the cable operators to change their product lifecycle, or add features via software upgrade, but as we just have shown, there is a very strong likelihood that disruptions will take place that will completely redefine the TV – and by extension set-top box – experience. As Consumer Groups have explained, the Commission must ensure that accessibility is achieved in most cases and avoid the situation where accessibility is achieved only in a minority of instances.²⁸ The Commission also must make clear that it expects service providers and manufacturers to take full account of advances in technology over time, even if a particular product or service cannot reasonably be made accessible at the time it is introduced. Consumer Groups believe that, in the event a waiver is granted, its term should be no more than one (1) year. In other words, the waiver would cover those

²⁷ Why the iPhone Was Truly a Disruptive Product (June 29, 2012). Available at: <http://mashable.com/2012/06/29/iphone-turns-5-op-ed/>

²⁸ See e.g., Consumer Groups Comments in Response to Notice of Proposed Rulemaking, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, at pp. 16-17 (filed April 25, 2011).

devices first manufactured or introduced to the market one (1) year from the waiver grant date. Given the pace with which products and their marketing and development change in this industry and given the expected increases in market penetration described above, the burden should be on the industry to show why further waivers should be granted.

In addition, to the extent a waiver is granted, the Commission must specifically define the equipment covered in a particular class. The waiver should not cover multiple generations of set-top boxes, particularly since NCTA is not seeking such coverage. Further, as necessary, the Commission should clearly articulate the standard to determine whether a device is (or is not) designed and marketed to display video content – principally full-length, professional-quality video programming. Consumer Groups also request that the Commission provide an effective, expeditious process for the public to file complaints about any improper application of a waiver to equipment not expressly covered.

IV. CONCLUSION

For the reasons set forth herein, the Consumer Groups respectfully request that the Commission deny the NCTA's waiver request with respect to cable operator-leased settop boxes, unless the waiver period is narrowly limited, the equipment included in a particular class is specifically defined, and a condition is provided to allow complaints to be filed about any improper application of a waiver.

Respectfully submitted

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